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No. 84-948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRAWFORD COUNTY WISCONSIN,
Petitioner,

vs.

WESLEY N. HEIAR, KENNETH I. STRAUMAN and MYRL E. BROWN,
Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPLEMENTAL APPENDIX

DAVID LEO UELMEN
788 N. Jefferson, Box 92099
Milwaukee, Wisconsin 53202
414-271-4500

Attorney for Petitioner

Of Counsel:
DAVID PREVIANT
LARRY STEFFES
GOLDBERG, PREVIANT, UELMEN, GRATZ,
MILLER & BRUEGGEMAN S.C.
788 N. Jefferson Street, Box 92099
Milwaukee, Wisconsin 53202
414-271-4500

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to U.S. Supreme Court Rule 22.5, Petitioner submits the following arguments in reply to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari in the above captioned case.

I. REASONS FOR GRANTING THE WRIT.

1. There Is A Direct Conflict Between The Decisions Of The United States Circuit Courts of Appeal On The First Issue Raised In The Petition For Writ of Certiorari.

Several United States Circuit Courts of Appeal have held that an age less than 70 is a bona fide occupational qualification (BFOQ) for law enforcement and firefighting personnel.[1] The Courts of Appeal for the Fourth and Eighth Circuits have relied on the Congressional determination embodied in 5 U.S.C. § 8335(b), in reaching the conclusion that age is a BFOQ for law enforcement and firefighting personnel. See *Johnson v. Mayor and City of Baltimore, supra; EEOC v. Missouri State Highway Patrol, supra.* In fact, the court in *Johnson* specifically held that the City was entitled to the BFOQ defense, as a matter of law, because of congress' adoption under 5 U.S.C. § 8335(b) of the identical retirement age for federal firefighters. 731 F.2d at 212-13. The decision of the court below, notwithstanding specific acknowledgment of the *Johnson* opinion, held to the contrary on this very issue. (See Petition App. 14-15).

This Court has agreed to resolve the conflict between the circuit courts on this significant issue by accepting the Petition for a Writ of Certiorari in *Johnson* on the following question:

> Does federal civil service retirement statute, 5 U.S.C. § 8335(b), which authorizes involuntary retirement of federal firefighters at age 55, establish as a matter of law

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[1] *Johnson v. Mayor & City of Baltimore,* 731 F.2d 209 (4th Cir. 1984), *cert. granted,* 53 U.S.L.W. 3496 (U.S. Jan. 15, 1985) (No. 84-518 and 84-710); *EEOC v. Missouri State Highway Patrol,* ____ F.2d ____, 36 F.E.P. Cases 401 (8th Cir. Nov. 12, 1984); see also *Mahoney v. Trabucco,* 738 F.2d 35 (1st Cir. 1984), *cert. denied,* 53 U.S.L.W. 3403 (U.S. Nov. 26, 1984) (No. 84-513) (holding that age 50 is a BFOQ for state police officers).

that age 55 is a bona fide occupational qualification under ADEA for non-federal firefighters nationwide?

53 U.S.L.W. 3496 (U.S. Jan. 15, 1985) (No. 84-518). This is the precise issue raised by the petition at bar. Respondents' attempts to distinguish this case from *Johnson* are insufficient to render "academic" the conflict in the holdings between the Fourth and Seventh Circuits on the issue of the relevance of 5 U.S.C. § 8335(b) to the ADEA.

For the purpose of proving the applicability of 5 U.S.C. § 8335(b), Crawford County introduced at trial substantial evidence to show that the County's law enforcement officers performed work similar to that performed by law enforcement officers employed by the federal government which has selected age 55 as its mandatory retirement age.[2] The trial court made findings consistent with the position that the work performed by state and federal law enforcement personnel is similar. (See Petition App. 36-37). Moreover, contrary to the implied argument of respondent, the court below did not base its denial of the applicability of 5 U.S.C. § 8335(b) on a rejection of the trial court's findings that the requisite duties of state and federal law enforcement personnel are similar.

The respondent also argues, as a basis for distinguishing *Johnson,* that 5 U.S.C. § 8335(b) does not apply to the County's law enforcement officers because certain exceptions to the retirement of federal law enforcement personnel would be available to the County employees thus making their retirement

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[2] Many duties performed by employees working for state governments are identical to those of federal employees. For example, prison guards in state prisons perform much the same work as prison guards in federal prisons. 5 U.S.C. § 8335(b) has been sustained as having a "rational basis in fact" when applied in the context of the retirement of federal employees. *See Bowman v. U.S. Department of Justice,* 510 F.Supp. 1183 (E.D. Va. 1981), *aff'd,* 679 F.2d 876 (4th Cir.), *cert. denied,* 459 U.S. 1072 (1982).

at 55 voluntary, not mandatory (Resp. Brief, p. 14). This argument, however, fails to erase the conflict between *Johnson* and the court below on the applicability of 5 U.S.C. § 8335(b) to the ADEA.

The court in *Johnson* held, based on the reasonable federal standard set out under 5 U.S.C. § 8335(b), that age was a BFOQ for comparably situated non-federal employees *notwithstanding the very argument raised by the respondents. See Johnson,* 731 F.2d at 213 n. 12; *see also* 731 F.2d at 217-18 (Winter, C.J., dissenting). In direct contrast to *Johnson,* the court below rejected the applicability of 5 U.S.C. § 8335(b) *based on the very argument raised by the respondents* (see Petition App. 14-15).[3]

2. There Is A Conflict Between The Circuits On The Standards To Be Applied In Determining The Burden Of Proof Necessary To Establish Age As A Bona Fide Occupational Qualification For Employees Working In Jobs That Affect Public Safety.

Contrary to the respondents' position, the decision of the court below is not in accord with prior holdings of this Court or other federal court holdings. A survey of prior federal precedent reveals that there has not been uniform application of the criteria necessary for determining the existence of a BFOQ defense. (See Petition p. 10-13). While many courts have adopted the criteria set forth in the EEOC guidelines, 29 C.F.R. § 1625.6, as a basis for evaluating the BFOQ defense, the application of the guidelines (the sufficiency of evidence necessary to meet the EEOC guidelines) has been far from consistent.

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[3] The Petitioner also notes that the applicable state statute, like its federal counterpart, also provided exceptions to mandatory retirement of law enforcement employees. See Wis. Stat. 41.11(1) (Petition App. 86). As construed by the court below, the federal law preserves the right of the employer to grant or deny extensions for federal employees but *sub silentio* prohibits the state from exercising this discretion for the same job classifications.

Petitioner submits that Congress did not intend to permit trial courts and juries to decide, on a case by case basis dependent upon separate evidentiary showings, the issue of whether a municipality is permitted or prohibited from retiring its law enforcement officers at age 55. While such an allowance *may* be workable in classifications of employment where the continuation of an employee affects only profits or productivity, this cannot be the rule in jobs where public safety considerations are paramount.

Indeed, the decisions in most circuits have apparently recognized the importance of uniformity in the application of a BFOQ for a mandatory hiring age limit in occupations affecting public safety.[4] Such uniformity is of equal or greater importance in mandatory retirement cases. A recent decision of the United States District Court for the Eastern District of Wisconsin rejected age 55 as a bona fide occupational qualification for deputy sheriffs holding that it would be "disastrous" to permit compulsory retirement of deputy sheriffs in one County of Wisconsin at age 55 while prohibiting it in another. *Kossman, et al v. Calumet County*, Civil Action No. 81-C-419, 83-C-1669, 84-C-879 (E.D. Wis. 1985). (Supp. App. 5). The trial court's point as to the need for intra-state consistency is clearly correct. Public safety considerations and the special protections and benefits which are incorporated in the state statutes for these classifications of employees require uniform handling. This Court should grant Writ in this case to insure the consistency which is required.

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[4] Limiting to 40 years the hiring age in occupations affecting public safety seems to be achieving universal acceptance. *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

3. Contrary To The Respondents' Assertions, The Statutes Of Limitations Issues Should Be Resolved By This Court.

A. The 180-Day Statute.

The respondent asserts that the Wisconsin statutes are too confusing for the ordinary reader to make a determination as to whether Wisconsin is a "deferral state". (Resp. Brief, p. 19). Indeed, the decision of the Court of Appeals reflects this position. In its opinion the court below stated:

> *** a state court might have decided that only hazardous law enforcement jobs were intended to be excluded and might have gone on to find that these plaintiffs' jobs were not hazardous.

(Pet. App. 8).

The Petitioner submits, however, that the statute is not subject to the equivocation found by the court below and the respondent. The plain and unambiguous statutory language at issue provides:

> The prohibition against discrimination because of age shall not apply to hazardous occupations including, without limitation because of enumeration, law enforcement or firefighting.

Wis Stats. § 111.32(e). (Petition App. 86).

It strains credulity to assert that the law enforcement officers in Wisconsin (who were the main lobby force for the establishment of age 55 as the mandatory retirement age) did not know that the statutory prohibitions against age discrimination, by express terms, exempted those job classifications from coverage. Indeed, "deputy sheriffs" are specifically mentioned in § 41.02(11)(a) Stats., the statutory definition of "protective occupation participant". (Petition App. 85).

Because the age discrimination statute expressly excluded this classification from coverage, thereby precluding state agencies from affording relief, Wisconsin was by definition not a "deferral state". 29 U.S.C. §§ 626(d)(2) and 633(b). Because relief was not available under state law, the charge had to be filed within 180 days of the unfavorable employment decision.

B. The Two-Year Statute.

Contrary to the respondents' argument, Petitioner submits that it was an abuse of discretion for the court below to deny this statute of limitations defense under the facts of this case.

Although the plaintiffs consulted counsel immediately after their retirement in June 1979, a complaint was not filed until a few days before the three-year statute of limitations was to expire apparently due to their strong conviction that the alleged violation was "willful". However, the trial court found that the violation was not willful and this finding was affirmed by the court below. Nevertheless, despite affirming the finding that the violation was not willful and determining that the defense of the statute of limitations had been generally raised in the County's answer, the court refused to apply the two-year statute of limitations and to dismiss the complaint as a matter of law.

No justifiable reason was given by the court below for striking the defense in its entirety other than the assertion that it was not "pressed" in the trial court.[5] However, it was the findings of the trial court that made this specific legal defense viable in the first place. Therefore, under these unusual circumstances, the County should have been permitted, even required, to raise the defense in the court of appeals.

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[5] The court of appeals agreed that the two-year statute of limitations was applicable but speculated that respondent might have "presented evidence in the district court to show that the defendants had tolled it ***." (Petition App. 11). However, no facts which would justify tolling were asserted anywhere in the briefs filed in the court below nor were any asserted in respondent's brief in this Court. If such facts exist, and the petitioner asserts they do not, the court below should have

It seems clear from the decided cases that the courts of appeal have permitted parties the opportunity of raising statute of limitations and other legal defenses for the first time on appeal (Petition pp. 16-17). To totally deprive petitioner of that defense, a defense the court below found meritorious, constituted, in these circumstances, an abuse of its discretion.

CONCLUSION

For the reasons stated above and set out in the Petition for a Writ of Certiorari, it is respectfully submitted that the Court grant the writ of certiorari in this case.

Respectfully submitted,

DAVID LEO UELMEN
788 N. Jefferson, Box 92099
Milwaukee, Wisconsin 53202
414-271-4500

Attorney for Petitioner

Of Counsel:
DAVID PREVIANT
LARRY STEFFES
Goldberg, Previant, Uelmen, Gratz,
Miller & Brueggeman s.c.
788 N. Jefferson Street, Box 92099
Milwaukee, Wisconsin 53202
414-271-4500

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included that issue in its remand order. See *Adato v. Kagan*, 599 F.2d 1111, 1116 (2d Cir. 1979). Instead of doing so the court deprived the petitioner of the defense in its entirety.

SUPPLEMENTAL APPENDIX

Kossman, et al., v. Calumet County, Civil Action No. 81-C-419, 83-C-1669, 84-C-879 (E.D. Wis. 1985).

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 81-C-419

Donald J. Kossman,
Plaintiff,

v.

Calumet County,
Defendant.

Civil Action No. 83-C-1669

Warran Jodar,
Plaintiff,

v.

Calumet County,
Defendant.

Civil Action No. 84-C-879

Rodney Ott,
Plaintiff,

v.

Calumet County,
Defendant.

DECISION and ORDER

(Filed Jan. 9, 1985)

These three consolidated cases were tried to the court in December of 1984 and January of 1985. The plaintiffs are three former Deputy Sheriffs (one, however, has been reinstated) from Calumet County, Wisconsin. All have brought suit against the County, charging that its mandatory retirement age

of 55 for deputy sheriffs violates the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* Although I have a great deal of sympathy for the County in these cases as it tries to make some sense out of what is an almost impossible maze and mismatch of judicial opinions and legislative determinations, I find for the plaintiffs and direct that judgment be entered in favor of each of them as provided herein.

Donald Kossman was born June 28, 1925. He started working as a Deputy Sheriff in Calumet County in 1957. Shortly after reaching age 55, on December 31, 1980, he was terminated pursuant to the County's "mandatory retirement policy." At the time of his termination, Kossman held the position of Sergeant-Investigator with the department.

Warran Jodar was born on September 21, 1926. He was hired by the County in 1958, and was terminated pursuant to the policy on October 1, 1981.

Rodney Ott was born on April 6, 1927, and was hired by the County in 1963. Ott was terminated pursuant to the policy on June 30, 1982. Without prejudice to the rights of the county to claim that its actions were proper in this case, it reinstated Ott as a Deputy Sheriff on March 26, 1984. At the time of his termination in 1982, Ott held the position of Sergeant-Traffic Officer, the same position that had been held by Jodar.

Calumet is a small mideastern county in Wisconsin. Its 1970 population was 27,604. In 1980, its population was 30,867. Depite its relatively small size, it is, of course, subject to the provisions of the age discrimination law. *EEOC v. Wyoming,* 460 U.S. 226 (1983).

The Act prohibits discrimination on the basis of age against all persons within the protected age group, now ages 40 through 70. The issue in this case is whether Calumet County's mandatory retirement age policy falls within the Act's exception for cases "where age is a bona fide occupational qualification

reasonably necessary to the normal operation of the particular business . . .." 29 U.S.C. § 623(f)1). The county, has the burden of proving the bona fide occupational qualification (BFOQ) defense that it raises in this case. I find that the credible evidence in this case falls far short of that necessary to carry the burden. Having listened to and observed the plaintiffs, I am convinced that they are fully able to discharge the duties of a Calumet County deputy sheriff despite their respective ages. Accordingly, I reject the defense and find in favor of the plaintiffs.

In *Orzei v. City of Wauwatosa Fire Dep't,* 697 F.2d 743 (7th Cir. 1983),—a case that involved the application of a mandatory retirement age of 55 to an assistant fire chief—the Court of Appeals for this Circuit held that it was not enough for an employer "to show that it made a good faith judgment concerning the safety needs of its citizens" when it enacted the mandatory retirement policy. The Court in *Orzei* rejected the argument that the employer's "mandatory retirement policy should be upheld as long as that policy is 'not the result of an arbitrary belief lacking in objective reason or rationale' . . .." If a good faith judgment, based simply on some loose correlation between the needs of the job and the effects of age were enough to bring a mandatory retirement policy within the BFOQ exception the Act would have, as the Court noted, little effect. More is required of a defendant seeking the protection of a BFOQ defense.

Obviously, some of the duties of a Calumet County Deputy Sheriff require quick, strenuous, and sometimes vigorous physical activity, and sometimes the conditions of employment are hazardous. Certainly also, one's ability to respond diminishes with age. In this case, the county has done little more than attempt to establish some inverse correlation between age and job fitness. It has not done so, and even if it did it would not be enough to carry its burden.

Many of the duties performed by a Calumet County Deputy Sheriff, a police officer in a small, rural, and sparsely populated

county, are not particularly dangerous. There is nothing in the record that convinces me to the degree of proof required, that one's ability to perform the tasks of a Calumet County Deputy Sheriff are diminished to such an extent at age 55 that it is "reasonably necessary" to the normal operation of the Sheriff's Department that the officer be relieved of his duties.

In a similar case tried in the Western District of Wisconsin, Judge Shabaz found that three Deputy Sheriffs employed by Crawford County were entitled to reinstatement, as their discharge by the county violated the Age Discrimination In Employment Act. Judge Shabaz rejected the defense of Crawford County that its action was justified as a BFOQ. Against the "not clearly erroneous" standard, the Court of Appeals for this Circuit affirmed Judge Shabaz in *Heiar v. Crawford County, Wisconsin,* ____ F.2d ____ (7th Cir. 1984).

Crawford County, which lies in the southwestern corner of Wisconsin, had a 1980 population of 16,556. It is hard to believe that the duties of a deputy vary significantly in Crawford and Calumet Counties. Also, if the law in this area is to have any redeeming value, it must afford some reasonable certainty to those trying to avoid violating it. In my judgment, it would be disastrous to find that deputy sheriffs could be retired involuntarily at 55 in Calumet County but not in Crawford County. Also, what would the policy be in the other 70 counties in Wisconsin? Inconsistent results in interpreting this area of the law would not serve the public interest.

In addition to a finding of liability in this case, the plaintiffs urge that I find the actions of the county to be "wilful" under the Act. A finding of "wilfulness" entitles the plaintiffs to liquidated, or double, damages. Considering the murky area of the law in which the issue in this case is raised and the obvious unfairness inherent in the decision of Congress to exempt federal personnel in the law enforcement area from the requirements of the Act, a finding of wilfulness in this case is out of the question. See the dissent of Judge Gibson in *Heiar v. Crawford County, supra.*

In conclusion, I find that the action of the defendant in retiring Kossman, Jodar and Ott violated the Age Discrimination in Employment Act. All are entitled to an award of back pay set off against the pension payments, unemployment compensation, and other income that they received during the period following their termination. Also, I find that each plaintiff should receive an award of interest to make them whole. Because substantial stipulations have been reached in these cases insofar as the damage figures are concerned, I will give the parties an opportunity to negotiate further and present to the court a stipulated bottom line damage plus interest award for each plaintiff. Hopefully, an agreement can be reached as to each and a judgment entered accordingly. If the parties are unable to agree on the amount of damages plus interest, they must file their respective positions with me on or before February 5, 1985, and appear at a hearing to argue the point on February 11, 1985, at 1:30 p.m. In addition, as prevailing parties, each plaintiff is entitled to an award of attorney's fees. Like the damage figures, the parties should attempt to reach an agreement on the sum and failing that, they should follow the same procedure outlined above in resolving the general damage question in this case.

Simply for guidance on the attorneys' fees issue, I think it appropriate to note that I believe this case, at least certainly the trial aspect of it, was not too well focused. It took 4 days of trial to put in the evidence, twice the time I was told it would take when the case was pretrialed. Some of the trial time was wasted on matters of general irrelevancy. The issue in this case, if properly focused, should have been presented in no more than the two days originally set as an estimate. This observation may warrant consideration by counsel on the issue of attorney's fees.

SO ORDERED at Milwaukee, Wisconsin, this 9 day of January, 1985.

BY THE COURT:

TERENCE T. EVANS
United States District Judge